Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 340.

THE CHEROKEE NATION, *et al.*, *Appellants*,

v.

ETHAN A. HITCHCOCK, Secretary of the Interior.

BRIEF OF APPELLANTS.

STATEMENT OF FACTS.

On the 23d day of October, 1901, the Appellants filed in the Supreme Court of the District of Columbia, their petition in substance, as follows:

1. That the Cherokee Nation is a body politic whose existence as such has been recognized by the Government of the United States from the foundation of the Government until this time; that Thomas M. Buffington, one of the complainants, is the Principal Chief of the Nation, and that the other Appellants named were citizens of that Nation.

2. That the Respondent, Ethan A. Hitchcock, is a citizen of the United States, residing in the District of Columbia, and is the Secretary of the Interior.

3. That by a treaty between the United States and the

Cherokee Nation west of the Mississippi river, dated May 6, 1828, the United States agreed "to possess the Cherokees and to grant it to them forever," seven millions of acres of land, the boundaries of which are stated therein, and in addition thereto, a perpetual outlet west as far as the jurisdiction of the United States extends.

4. That by article one of a treaty between the United States and said Nation, dated February 14, 1833, the guaranties of the former treaty of 1828, were renewed, with the promise that "letters patent shall be issued by the United States as soon as practicable for the lands hereby granted."

5. That by article 2 of a treaty of December 29, 1835, between said parties, said treaties were referred to and again affirmed.

6. That by article 3 of the treaty of 1835, it was agreed that the lands mentioned in said article and those ceded in 1833 should be included in one patent executed to the Cherokee Nation.

7. That by a patent dated December 31, 1838, the lands granted in said treaties were conveyed to the Cherokee Nation, "to have and hold the same, together with all the rights, privileges, and appurtenances thereto belonging, to the said Cherokee Nation, *forever*."

There was an exception to the effect that the lands "shall revert to the United States if the said Cherokee Nation becomes extinct, or abandons the same." There was also another exception which is of no importance at this time.

8. That by said treaties and patent the Cherokee Nation became the owner in fee simple of the lands so granted and conveyed, without any right or reversion unless the Nation should become extinct, or abandon the same, neither of which contingencies has happened.

9. That during the 64 years which have elapsed since said patent was executed and delivered its provisions have been recognized and observed by all the officials of the Government of the United States; that the Cherokee Nation has never by any act of its National Council or otherwise agreed to relinquish to the United States its right and the right of its citizens to the exclusive use, control, and occupation of any of the seven million acres of its lands, upon which the Cherokee people now reside, nor has the Nation ever authorized the United States or any of its officers to grant to persons or corporations, not citizens of the Cherokee Nation, the right to use or occupy any of the lands of the Nation for the purpose of cultivation, mining, or for any other purpose whatever.

10. That numerous applications have been made to the Secretary of the Interior, by persons who are not citizens of the Cherokee Nation, for leases of the lands of said Nation for the purpose of mining for oil, gas, coal, and other minerals; that among such applications is that of a corporation known as the Cherokee Oil and Gas Company, organized under the laws of Arkansas; that said application for a lease covers about 94,000 acres of land belonging to the Cherokee Nation, and now occupied by citizens of the Nation.

11. That the lands in the Cherokee Nation will, in the near future, be allotted to the citizens thereof, each of whom will be entitled to his proportionate share of said lands; that it is the desire of said citizens to take their respective allotments free from any encumbrance whatever, and especially free from any mining claims or leases upon such lands; that under said treaties and the patent from the United States said lands are the sole and exclusive property of the Cherokee Nation, which holds them in trust for all the members of the tribe; that the

"improvements made thereon, and in possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them," as provided in section 2 of article 1 of the Constitution of the Cherokee Nation; that numerous citizens of said Nation are now in possession of the lands embraced in said application and have made improvements thereon, which are their exclusive property.

12. Petitioners are informed that Respondent is giving favorable consideration to said application to the extent of a lease or leases upon eighteen sections, or upon 11,520 acres of said land, for the purpose of mining for oil and gas thereon, for the period of fifteen years; and petitioners are informed that Respondent is about to grant said application to said extent and for said purposes and time, and is thereby threatening to deprive petitioners and the other members of the Cherokee Nation of Indians of their right to the exclusive use and occupation of said lands; and unless restrained by this honorable Court, Respondent will cause irreparable injury, wrong and oppression to, and deprivation of, the property rights of petitioners and all other citizens of said Nation; that said lands are of great value, to wit, of the value of ten dollars an acre at least, and that said lands are believed to contain coal, oil or petroleum to a very large amount.

13. A prayer for injunction restraining Respondent and his counselors, attorneys, solicitors and agents, and all officials, clerks, agents or employees of the United States acting under his orders and instructions, from proceeding further in the matter of granting said application or any part thereof for mining leases on said lands; or in the matter of considering, hearing or granting any other application that may have been made, or may here-

after be made, for mining leases on land in said Nation, by any person or persons whomsoever; and for such other and further relief as the nature of the case and equity and good conscience may require.

14, 15, 16 and 17. Prayer for perpetual injunction and a temporary injunction, submitting interrogatories to Respondent, and for process.

Exhibit No. 1 (Record pp. 9, 10, 11, 12 and 13) contains the text of the patent from the United States to the Cherokee Nation, which embraces the lands in question in this case, which patent is signed by Martin Van Buren, President of the United States, and is dated December 31, 1838.

On the 1st day of November, 1901, Respondent filed his demurrer to said bill of complaint, giving as grounds therefor, that said bill is bad in substance and for want of equity, and does not state facts sufficient to entitle complainants to the relief prayed for or any relief; and that the court had no jurisdiction over the subject-matter of the suit, and that there was a defect of parties.

Reasons for said demurrer were submitted as follows:

1. That the matters named in said bill are matters of administration which cannot be taken away from an executive department, or carried into the courts.

2. That the Cherokee Oil and Gas Company was a necessary party to the suit.

3. That defendant was proceeding in accordance with the act of Congress of June 28, 1898 (30 Stats. 495), which it was claimed, was a valid exercise of the power of Congress over the property of said Indian tribe.

On the 6th day of May, 1902, Mr. Justice Hagner, of the Supreme Court of the District of Columbia, sustained said demurrer, and complainants electing to stand on their said bill of complaint, the same was dismissed. Where-

upon complainants took an appeal to the Court of Appeals of the District of Columbia.

On the 7th day of May, 1902, Mr. Justice Hagner, filed in said Court his opinion, giving his reasons for sustaining said demurrer (Record, pages 16, 17, 18, 19, 20, and 21).

On the 21st day of May, 1902, the Court of Appeals, by Chief Justice Alvey, affirmed the decision of the Supreme Court of the District of Columbia in said suit, and allowed an appeal to this Court. No opinion was filed (Record, page 23).

Brief and Argument.

First. It was agreed in the Court below between counsel for both parties in this case that the contention of the parties herein is largely along the lines of the matters involved in the case of Lone Wolf *et al. v.* Ethan A. Hitchcock *et al.*, No. 275, now pending in this Court, and set down for argument October 20, 1902.

Counsel for appellants therefore, with permission of the Court, file herewith the brief and argument submitted in that case, as a part of their brief and argument in the case at bar.

Appellee's Contention.

Second. Counsel for Appellee in the case at bar contends that section 13, of the Act of Congress of June 28, 1898 (30 U. S. Stats., page 455) confers authority upon the Secretary of the Interior to lease the lands of appellants for mining purposes, without their consent, and that such statute is a valid enactment.

Appellants' Contention.

Third. Counsel for Appellants contend that the act aforesaid does not in terms authorize such leases to be made; but conceding for the sake of argument that a fair construction of the said statute does authorize the Secretary of the Interior to lease Appellants' lands, without their consent for mining purposes, appellants deny the right and power of Congress to pass such a law; and cite the numerous treaties between the United States and the Cherokee Nation and the patent issued to the nation (Record, pages 9 to 13 inclusive) to sustain this contention.

A Part of the Fee.

Fourth. Coal, asphalt, oil and gas, and other minerals in place are a part of the realty, and a lease of land for mining purposes is a disposition of a part of the fee.

While it has not in general been the policy or practice of the United States to convey the absolute title to land upon which it has located Indian tribes to such Indians while they sustain their tribal relations, a contrary policy has been adopted in reference to the Five Civilized Tribes in the Indian Territory, which have received from the United States grants and patents conveying to them their lands in fee simple, subject only to the proviso that such lands shall revert to the United States if the Indians become extinct or abandon the same.

16 Am. and Eng. Encyc. of Law, Second Edition, page 231.

"By section 3 of the Act of May 28, 1830 (4 Stat. at L. 411), providing for the exchange of lands with the Indians, residing in any of the States or Territories, and for their removal west of the Mississippi river, it was pro-

vided that in the making of any such exchange it should be lawful for the President solemnly to assure the tribe or nation with which the exchange was made that the United States would forever secure and guarantee to them and their heirs or successors the country so exchanged with them, and, if they should prefer it, would cause a patent or grant to be executed to them for the same, provided that such lands should revert to the United States if the Indians became extinct or abandoned them. See the following treaties: With the Creeks, March 24, 1832, 7 Stat. at L. 366; February 14, 1833, 7 Stat. at L. 417. With the Cherokees, February 14, 1833, 7 Stat. at L. 414; December 29, 1835, 7 Stat. at L. 478. With the Chickasaws, May 24, 1834, 7 Stat. at L. 450; June 22, 1855, 11 Stat. at L. 611. With the Choctaws, September 27, 1830, 7 Stat. at L. 333; June 22, 1855, 11 Stat. at L. 611. With the Seminoles, May 9, 1832, 7 Stat. at L. 368; March 28, 1833, 7 Stat. at L. 423.

"Cherokee Nation.—Under the patent of December 31, 1838, the Cherokee Nation acquired a fee-simple title to their land, subject to the possibility of reversion to the United States should the nation become extinct or abandon the land. Holden *v.* Joy, 17 Wall. (U. S.) 211; U. S. *v.* Reese, 5 Dill. (U. S.) 405; U. S. *v.* Rogers, 23 Fed. Rep. 658; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641; Cherokee Strip Live Stock Assoc. *v.* Cass Land, etc., Co., 138 Mo. 394."

See Note 3 to text above quoted from 16 Am. and Eng. Encyc. of Law, Second Edition, page 231.

Mineral Locations on Indian Lands Void.

A properly constituted Indian reservation such as that occupied by Appellants is not public land of the United States until the Indian title is extinguished with their consent, and a mineral location thereon is void.

20 Am. and Eng. Encyc. of Law, Second Edition, page 690 and Note 2 on the text, citing Kendall *v.*

San Juan Silver Min. Co., 144 U. S. 658, affirming 9 Colo. 349; McFadden *v.* Mountain View Min., etc., Co. (C. C. A.) 97 Fed. Rep. 670; Golden Terra Min. Co. *v.* Mahler, 4 Mor. Min. Rep. 390.

OPINION OF MR. JUSTICE HAGNER.

Fifth. The opinion of Mr. Justice Hagner, of the Supreme Court of the District of Columbia in the case at bar was handed down after the Lone Wolf case had been decided by the Court of Appeals. His opinion followed the lines laid down in the opinion of the District Court of Appeals, to which reference has been made in the brief and argument in the Lone Wolf case. It is not necessary to restate the points submitted in that brief, as it is now before this court.

Counsel for Appellants, however, insist that due weight was not given to the Cherokee patent by the learned Justice of the Supreme Court of the District of Columbia. While the patent could not convey any greater title than the treaties had authorized to be granted, yet its insurance was a recognition by the Executive Department of the Government of the validity of the grant, of the identical land conveyed, and of the fact that the title had passed out of the United States and into the Nation; and that thereafter the Nation was to have and to hold the land embraced therein, together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation, *forever.*" The patent is an official muniment of title.

Counsel for Appellants insist that the Cherokee patent does place the Cherokee title and possession of their lands upon higher grounds than would be the case if no patent had ever issued. This patent was issued sixty-

four years ago. Its validity has never been drawn in question or disputed, until since the passage of the Act of Congress of June 28, 1898. That patent meant just what its terms imported. The Cherokees were to have and to hold said lands, together with all the rights, privileges and appurtenances thereunto belonging, *forever*, unless they abandoned them, or ceased to be a nation. These contingencies have never happened. The Cherokees insist that the Respondent is about to deprive them in part of the rights, privileges and appurtenances belonging to a part of their lands, and they have appealed to this Court to protect them in the enjoyment of their rights and privileges.

Appellants call attention to the further fact that they have been in the undisputed and exclusive possession of the lands embraced in said patent, ever since its execution, now nearly three-quarters of a century. When persons have been in undisputed and peaceable possession of real or personal property for thirty years it is too late to question the validity of the title. In the case of Trustees of the Episcopal Church in Newbern *v.* Trustees of Newbern Academy (2 Hawks. 233), it was held that where there had been a possession of thirty-five years, under a legislative grant, it was held conclusive evidence of good title, although the grant was unconstitutional. (1 Greenlief on Ev., Sect. 21 and Note 5.)

The Law of Estoppel.

Sixth. While the doctrine of estoppel does not usually apply to the State, yet when the State has executed a deed and under that deed property rights have grown up and been recognized, and persons, acting on the truth of the recitals in such deed have made expenditures and incurred

liabilities, the doctrine of estoppel applies against the State as well as it does against individuals. See 11 Am. & Eng. Encyc. of Law, Second Edition, page 396, and note 8, citing People *v.* Society, etc. (2 Paine (U. S.) 545; Carver *v.* Jackson, 4 Pet. 87; Menard *v.* Massey, 8 How. 313, and State decision in Alabama, California, Louisiana, Massachusetts, Minnesota, Missouri, New York, and Pennsylvania.

THE SETTLED DOCTRINE OF THE COURT.

Seventh. It has become the settled policy of this court that where a person has made his solemn deed, he may be estopped, not only from disputing the deed itself, but the facts it recited. It may be stated generally that recitals in deeds of matters which are particular and essential will bind the parties thereto, and their privies in blood, in estate, and in law. See 11 Am. & Eng. Encyc. of Law, Second Edition, page 400, and numerous cases cited in notes 6 and 7.

In Fort *v.* Allen, 110 N. Car., 191, the court said: "Where it is the intent of the parties to place the existence of a fact beyond question, or to make it the basis of the contract, the recital will be effectual, and neither party will be permitted to deny it."

See also: The Town of Coloma *v.* Evans, 92 U. S. 484; Town of Venice *v.* Murdock, *id.*, 494; Converse *v.* City of Fort Scott, *id.*, 503; Marcy *v.* Township of Oswego, *id.*, 637; Commissioners of Douglas County *v.* Bolles, 94 U. S. 104; Commissioners of Johnson County *v.* January, *id.*, 202; Buchanan *v.* Litchfield, 102 U. S. 278; School District *v.* Stone, 106 U. S. 186.

The Act of May 28, 1830.

Eighth. One of the recitals in the Cherokee patent (Record, page 10) is to the effect that all the lands ceded by the treaty of February 14, 1833 (which included the land in question in the case at bar), including the Outlet, and those ceded by that treaty "shall all be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States, according to the provisions of the act of May 28, 1830." The substance of those provisions is set forth in the fourth paragraph of this brief. This act was, therefore, a part of the patent, and it authorized the President solemnly to assure the Cherokees "that the United States would forever secure and guarantee to them and their heirs or successors the country so exchanged with them." The only exception was that the lands should revert to the United States if the Indians became extinct or abandoned them.

The word "revert" has a definite meaning. As used in the above exception, it means that the lands shall "go back" to the United States, if they are abandoned or if the tribe ceases to exist. How could they "go back" if the title had never gone out of the United States?

The courts below now hold in effect that this solemn guarantee and the patent granted by the United States do not create any "difference in the tenure of the lands of the Cherokee Nation from that of the other tribes" (Record, page 20), which was stated to be that the Indians "have no title to the lands they occupy," and that "their right is simply to occupy at the will of the Government and under its protection." (Record, pp. 17 and 18.)

It is not possible by any admitted rules of construction of contracts or treaties to give to the Cherokee patent the meaning which the courts below have placed upon it.

The language of the recitals in the patent is not only free from any ambiguity, but it is plain and unmistakable.

This court, speaking through Mr. Justice Harlan, in the case of the United States *v.* The Choctaw Nation, referring to the construction of treaties with Indian tribes, held as follows:

"What was said in the *Amiable Isabella* (6 Wheat. 1, 71, 72), is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: 'In the first place, this court does not possess any treaty-making power. That power belongs, by the Constitution, to another department of the Government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power and not an exercise of judicial functions. It would be to make and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any motion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model part of the treaty, equally give the rule to the judicial tribunals."

See United States *v.* Choctaw Nation, *et al.* 179 U. S. 494.

This Court will have no difficulty in finding out the intention of the "contracting parties" to the Cherokee treaties and the Cherokee patent, and having found that it will be its duty, and it is bound, as this Court holds, to give effect to the stipulations of the treaty, "*in the manner and to the extent which the parties have declared, and not otherwise.*" Hence we do not apprehend that this Court will hold that the language of the Cherokee patent, "to have and to hold, together with all the rights, privileges and appurtenances thereto belonging, forever," means "to have and to hold at the will of the United States, and with only such rights, privileges and appurtenaces as Congress may, from time to time, permit."

Constitution in Force in Indian Territory.

Ninth. It was provided in Section 31 of the Act of Congress of May 2, 1890, to organize a temporary government for Oklahoma, and to enlarge the jurisdiction of the United States Court in the Indian Territory, that: "The Constitution of the United States * * * shall have the same force and effect in the Indian Territory as elsewhere in the United States."

In the case of Downes *v.* Bidwell, one of the Porto Rico cases recently decided by this Court, it was held: "That where the Constitution has been once formally extended by Congress to Territories, neither Congress nor the Territorial legislature can enact laws inconsistent therewith."

The Constitution provides that: "No person shall be * * * deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." (Amendment, Article 5.)

The Cherokee Nation holds the lands in question for the benefit of the Cherokee people. Can they be deprived of its use without their consent, except by due process of law?

CHEROKEE INDIANS ARE CITIZENS OF THE UNITED STATES.

Tenth. Congress passed an Act of March 3, 1901, which made every Indian in the Indian Territory a citizen of the United States, with all the rights, privileges and immunities of other citizens thereof. (31 U. S. Stats., p. 1447.)

NO LONGER WARDS OR INCOMPETENTS.

Eleventh. The contention so often put forth that Indians are the dependent wards of the Nation and that Congress may, by reason of this fact, dispose of them and their lands as it, in its wisdom, may see fit, will not avail as to the Cherokees. They are now citizens of the United States, having all the rights, privileges and immunities of other citizens, and their property is as sacred in the eyes of the law and their titles are as unassailable as if they were citizens of Massachusetts and descendants of the Pilgrim fathers. They hold their lands, as already pointed out in this brief, not only by solemn treaty provisions with the United States, but by a patent which has been recognized as valid and binding upon the United States, by all the departments of the Government, for nearly three-quarters of a century. It is now too late for Congress, or for any of the departments of the Government to disregard their right to the exclusive use and occupation of their lands until they voluntarily relinquish them.

FACTS ADMITTED.

Twelfth. As the case at bar was disposed of in the courts below on demurrer, all facts alleged in the Bill of Complaint properly pleaded are admitted. It is stated in said Bill of Complaint (Record, page 5):

"That the Cherokee Nation has never, by any act of its national council or otherwise, agreed to relinquish to the United States its right and the right of its citizens to the exclusive use, control and occupancy of any of the seven millions of acres of its lands, upon which the Cherokee people now reside, nor has said nation ever agreed to authorize any officer or department of the United States to grant persons or corporations, not citizens of the Cherokee Nation, the right to use, or occupy any of the lands of the nation for the purpose of cultivation, mining or for any other purpose whatever, except in some instances for the right of way for railroad corporations."

This fact is properly pleaded and it is admitted by the demurrer.

It is also admitted by the demurrer that the Respondent is considering an application for a lease upon a portion of their said lands to the extent of 11,500 acres for the purpose of mining for oil and gas thereon, for a period of 15 years; and that he is about to grant said application to that extent and for that purpose and time; and said Respondent is about to execute a lease or leases upon all or a part of said land to persons not citizens of the Cherokee Nation. (Record, pages 5 and 6.) And it is for the purpose of preventing the execution of such leases, or any leases whatever upon the lands of the Cherokee Nation, that an injunction is prayed in this case.

In view of the elaborate brief and argument in the Lone Wolf case, which applies in nearly all respects to

the case at bar, a further brief in this case is deemed unnecessary.

In Conclusion.

Counsel for Appellants respectfully submits:

First. That the Cherokee Indians are no longer the dependent wards of the United States; but that they are citizens, entitled to all the rights, privileges and immunities of other citizens of the United States.

Second. That the right of the United States to dispose of, interfere with, or to control in any way, the lands of the Cherokee Nation, is limited to the express, or necessarily implied, conditions of the contract of purchase of such lands.

Third. The contract by which the Cherokee Nation holds its lands is to be found only in the treaties, which the nation has made with the United States, and in the patent to such lands, which the United States has executed and delivered to the nation. That said patent was issued and delivered sixty-four years ago; that said Indians have occupied said lands from that time to the present, and that the right to the exclusive use and occupation of said lands by the Cherokee people has been recognized by all the Departments of the Government of the United States from that time to the present; and that Congress cannot, if it would, deprive the Cherokee people of such right, without their consent, except by the due process of law.

Fourth. That the Cherokee Nation has never, directly or by implication, given its consent to the leasing of any of its lands by the United States for mining purposes.

Fifth. That the citizens of the Nation who have made, or who are rightfully in possession of the improvements on the lands of the Cherokee Nation, have the right to the

exclusive use and occupation of the lands upon which improvements have been made, and that Congress has no right or power to deprive them of such right without their consent and the consent of the Nation.

Counsel for Appellants, therefore, respectfully insists that the judgment of the court below should be reversed and the cause remanded with directions to overrule the demurrer, and to issue an injunction, restraining the Respondent from granting the application of the said Cherokee Oil and Gas Company, and the applications of all other persons, for leases of any kind upon any of said lands, except in pursuance of the provisions of an agreement between the Nation and the United States. And counsel for Appellants insists that no such agreement has ever been made, and that no concurrence of action whatever has ever taken place between the Nation and the United States that would authorize the Secretary of the Interior to grant the application of the Cherokee Oil and Gas Company, or any other application for a lease or leases upon any of said lands.

Respectfully submitted.

WILLIAM M. SPRINGER,
Solicitor for Appellants.